

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA,

Case No. 3:22-cr-00010-MMD-CLB-1

Plaintiff,

ORDER

v.

CHRISTINE DAWN LYNN CARSON,

Defendant.

I. SUMMARY

Christine Dawn Lynn Carson was indicted on a single count of distribution of a controlled substance in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). (ECF No. 1.) This charge is grounded on the allegations that Carson sold methamphetamine on one occasion to an undercover agent (“UC”) with the Drug Enforcement Agency (“DEA”). (ECF No. 47 at 2.) Carson now moves to dismiss the indictment based on outrageous government conduct—namely that allegedly a confidential informant, with the government’s knowledge, had an ongoing sexual relationship with Carson and induced her into making the drug sale.¹ (ECF No. 41 (“Motion”).) As further explained below, because Carson fails to meet the “extremely high standard” for dismissal on the grounds of outrageous government conduct, the Court denies the Motion.

¹The government filed a response (ECF No. 47), and Carson filed a reply (ECF No. 58). Carson sought leave to file an oversized reply, which the Court grants, given Carson’s representation that the government produced extensive discovery after the filing of the Motion. (*Id.* at 1 n.1.) Carson requested an evidentiary hearing. (*Id.* at 1, 28.) The Court granted the request and held an evidentiary hearing on the Motion, where Lyon County Sheriff’s Office Lieutenant Tyrell Joyner and confidential informant Paul Harlow testified, and counsel for both sides presented argument. (ECF No. 71 (the “Hearing”).)

1 **II. FINDINGS OF FACT²**

2 The Court relies on the evidence the parties submitted in connection with the
 3 Motion, the evidence admitted at the Hearing, and witness testimony at the Hearing to
 4 construct this factual background. The Court only makes factual findings pertinent to the
 5 legal discussion that follows.

6 **A. Harlow and Carson's Relationship**

7 Paul Harlow was the confidential informant in this case. (ECF No. 41-6 at 2; ECF
 8 No. 48-1 at 4-7.) According to Harlow, before becoming a confidential informant, he met
 9 Carson in late 2020 "because [he] was selling drugs to her" while she was "very addicted."
 10 (ECF No. 41-6 at 2.) Harlow claims that he and Carson eventually started having sex,
 11 "had sex on average once a week for months," and "would sext over text messages,
 12 Facebook, and Instagram." (*Id.* at 2-3.) Harlow believes that Carson was "in love" with
 13 him and that she was his "puppet." (*Id.* at 3.) According to Harlow, he "knew [he] could
 14 get her to do anything," and Carson demonstrated that she "would do anything" for him
 15 by cleaning his house, doing his laundry, giving him money, and buying him gifts. (*Id.*)

16 In text message³ exchanges between Carson and Harlow from June 2021, Carson
 17 made several offers to do favors for Harlow, such as getting him groceries and giving him
 18 cash, her EBT card, and drugs. (ECF No. 41 at 9-10; ECF No. 42 (video of Carson-Harlow
 19 messages).) In one such instance, she messaged Harlow, "I got money drugs and ebt if
 20 u need i can drop off if u want." (ECF No. 42.) In those text exchanges, Carson also
 21 mentioned that she had bought a phone for Harlow to gift his son. (*Id.*) And at different
 22 points, she messaged Harlow: (1) "I really like u. More than I should. And its not about
 23 sex. Thats just a bonus"; (2) "It wasnt about sex . . . All I wanted was to be around u"; (3)
 24 "I loved u and I go[t] to move on"; (4) "U can't even see that I had fell in love with ur ass .

25
 26 ²See Fed. R. Crim. P. 12(d) ("When factual issues are involved in deciding a motion, the court must state its essential findings on the record.").

27 ³For ease of reference, the Court uses the phrases "text(s)," "text message(s),"
 28 and "message(s)" to refer interchangeably to written phone communications conducted through SMS text messaging, the Facebook messenger application, and the Instagram messenger application.

1 . . I'm stopping I can't keep hurting myself over someone who never wanted me in the
 2 first place"; (5) "no matter what goes down between us I do love you"; and (6) "I meant it
 3 when I said I love you." (*Id.*)

4 **B. Harlow as a Confidential Informant**

5 After Harlow was arrested in April 2021 and taken into custody at the Lyon County
 6 Jail, Lyon County Sheriff's Office ("LCSO") Lieutenant Tyrell Joyner and other officers
 7 discussed with Harlow the possibility of becoming a confidential informant to receive
 8 assistance with his criminal case.⁴ (ECF No. 48-1 at 2; ECF No. 41-6 at 2.) Harlow
 9 subsequently decided to become a confidential informant. (*Id.*) According to Joyner,
 10 during such discussions, he "specifically tell[s] confidential informant prospects that [they]
 11 will not try to create a drug dealer or criminal and that the case [they] work with them [on]
 12 must be a legitimate drug dealer." (ECF No. 48-1 at 2.)

13 On April 23, 2021, Joyner signed Harlow up as a confidential informant. (ECF No.
 14 48-1 at 2, 13-15.) Harlow completed and signed the LCSO Cooperating Individual
 15 Information Form and Activation Agreement, in which he acknowledged that "[he]
 16 underst[oo]d that in the course and scope of [his] activities as a [confidential informant],
 17 [he is] not to entice (through friendship, sympathy, sexual favors etc.) or entrap any
 18 person(s) to accomplish any criminal activity." (*Id.* at 13-17.)

19 Before Harlow began informing on Carson, he assisted law enforcement with
 20 several other investigations. At the Hearing, Joyner testified that Harlow first provided
 21 information on the fraud ring and related shooting that led Harlow to be arrested in the
 22 first place. Harlow then provided information on a stolen motorcycle, which was eventually
 23 recovered, and the case was successfully prosecuted. (ECF No. 48-1 at 3.) Harlow next
 24
 25

26 ⁴At the Hearing, Harlow claimed that LCSO had seized his cell phone as part of
 27 this arrest and that LCSO still had possession of his phone. The Court directed the
 28 government to verify whether LCSO had possession of any phone belonging to Harlow.
 In response, the government filed a supplemental report indicating that, according to
 LCSO records, Harlow's phone was taken from him during his arrest on April 14, 2021
 but was not booked into evidence and was returned to Harlow upon his release from jail
 on April 16, 2021. (ECF No. 74 at 1-2.)

assisted law enforcement with a narcotics investigation unrelated to the one here and helped conduct a controlled drug purchase. (*Id.* at 3-4.)

C. Investigation of Carson

According to a DEA report, in July 2021, Harlow identified Carson as a “crystal methamphetamine trafficker” by informing LCSO investigators that Carson was “advertising and/or trying to sell roughly three to four ounces of crystal methamphetamine.” (ECF No. 48-1 at 11.) Specifically, on July 14, 2021, Harlow texted Joyner a photo of what appeared to Joyner as a hand holding a large shard of methamphetamine. (*Id.* at 4, 51.) Along with the photo, Harlow shared a screenshot of a text that read, “I will do what u want for what u want . . there’s four zips here and I even fronted Sean a quarter and someone else a quarter and told them to bring me a bill for each.” (*Id.* at 51-52.) Harlow then texted Joyner another screenshot of messages that read, “Yo I got some shit for sale / 120 a quarter of some super fire shit came in from out of town.” (*Id.* at 53.) Harlow shortly thereafter sent Joyner a screenshot of a Facebook profile that Harlow identified as Carson’s. (*Id.* at 55.) According to Joyner, Harlow later shared over the phone that: (1) Carson had sent Harlow the photo of the purported shard of methamphetamine and the first set of texts; and (2) someone named Cory Tyler sent the second set of texts and had purchased the methamphetamine from Carson. (*Id.* at 4.) Joyner claims that Harlow had sent him Tyler’s texts to show him that “Carson was selling the methamphetamine quickly.”⁵ (*Id.*)

Before Harlow had informed LCSO investigators of Carson's alleged drug trafficking activities, the LCSO investigators "were unaware of Carson" or her relationship with Harlow. (ECF No. 48-1 at 11.) Joyner confirms that "[w]hile speaking with Harlow [about Carson for the first time], [he] informed him that [he] did not know who Carson was." (*Id.* at 4.) According to Joyner, Harlow shared that Carson "lays low because she

⁵At the Hearing, Carson argued that Joyner was inconsistent in his testimony when identifying Carson and Harlow's text messages. The Court however finds that Joyner was in fact consistent in his testimony about who sent which messages in the screenshots sent to him.

1 has a Felony Arrest Warrant from Nevada Parole and Probation for a drug charge" and
 2 that she "was married or together with an individual named Joshua Ono." (*Id.*) Harlow
 3 later informed Joyner that Carson had been pulled over in Fernley with one of her drug
 4 suppliers and that she had used her sister's name during the traffic stop to avoid being
 5 arrested on her outstanding warrant. (*Id.* at 5.) Using that information, Joyner verified that
 6 law enforcement had indeed conducted that traffic stop, consistent with Harlow's
 7 information. (*Id.*)

8 **1. Whether Harlow Told Joyner that Carson Was Not a Drug Dealer**

9 According to Joyner, Harlow explained that "Carson ha[d] been selling large
 10 amounts of methamphetamine in Fernley . . . because she ha[d] a very good supplier out
 11 of California." (*Id.* at 4.) In contrast, Harlow asserts in his declaration that he had told
 12 Joyner that Carson "wasn't a drug dealer" but that "she would be able to get drugs if [he]
 13 asked." (ECF No. 41-6 at 3.) But Joyner claims that Harlow never told him that "Carson
 14 was not a drug dealer, or was not 'in the game.'" (ECF No. 48-1 at 6.)

15 Regarding whether Harlow told Joyner that Carson was not a drug dealer, the
 16 Court finds Joyner credible and Harlow not credible. Joyner's testimony at the Hearing
 17 that Harlow never told him that Carson was not a drug dealer was consistent throughout
 18 the Hearing and with his declaration and text messages with Harlow. On the other hand,
 19 Harlow's testimony at the Hearing on this issue was inconsistent. When first asked if he
 20 told Joyner that Carson was not a drug dealer, he testified that he did not think so because
 21 he would have "played both sides" on that. He later testified that he may have told Joyner
 22 that Carson was a drug dealer and that he told Joyner "whatever it took" to help his own
 23 case. Then, after Harlow was shown the portion of his declaration where he stated he told
 24 Joyner that Carson was not a drug dealer, he answered "correct" twice when asked if he
 25 told Joyner that Carson was not a drug dealer. His flipped testimony supports a finding of
 26 lack of credibility.

27 Moreover, Harlow testified that he knew he had to give useful information to law
 28 enforcement to obtain any benefit of getting his criminal case resolved. It therefore would

1 not have made sense for Harlow to affirmatively tell Harlow that Carson was not a drug
2 dealer, particularly in the context of Harlow providing useful information on drug
3 trafficking. Even if Harlow would not characterize Carson as a “bona fide drug dealer,” as
4 he indicated at the Hearing, he did in fact testify that he knew Carson had the “resources”
5 to get drugs if he asked her to. Harlow also testified that he “played both sides” and
6 admitted to taking kickbacks from the controlled buys and not telling law enforcement. He
7 further readily admitted that he was using methamphetamine during the relevant period
8 of time, and the defense argued that there may be gaps in Harlow’s memory due to his
9 drug use. Based on all of this testimony, the Court finds that Harlow’s testimony regarding
10 whether he told Joyner that Carson was not a drug dealer lacks credibility.

11 **2. Whether Harlow Told Joyner About His Sexual Relationship
12 with Carson**

13 According to Harlow, he “was having sex with [Carson] when [he] was cooperating
14 against her.” (ECF No. 41-6 at 3.) He claims that he told Joyner about his sexual
15 relationship with Carson “from the beginning of [his] time cooperating,” that he would
16 “brag” to Joyner about having sex with Carson, and that he told Joyner “she would do
17 anything for [him].” (*Id.*) Harlow further claims that he and Joyner talked about his
18 relationship with Carson several times, including joking about how he was a “Casanova,”
19 and that he showed Joyner text messages from Carson that showed “she was obsessed
20 with [him] and that she was in love with [him].” (*Id.*)

21 In contrast, according to a DEA report, the only information shared by Harlow to
22 LCSO investigators about his relationship with Carson was that he was “a self-proclaimed
23 ‘ladies []man’ and that []he believed Carson was interested in him[].” (*Id.* at 11.) Joyner
24 claims that another officer made the “ladies man” comment to Harlow in the context of a
25 “joking conversation” that had “no specific bearing to any investigation.” (*Id.* at 3-4.)
26 According to Joyner, Harlow described Carson as “naïve” and told him that she trusted
27 him enough that there would be no issues with introducing an undercover agent to her.
28 (*Id.* at 6.) Joyner also claims that Harlow “did not ever tell [him] that he has had or was

1 having sex with Carson" and that Harlow "described their relationship as them being
2 friends but that she was infatuated with him and wanted to be in a relationship with him."
3 (*Id.*) At the Hearing, Joyner also testified that Harlow never told him that Carson was his
4 "puppet" or "pawn," never told him that Carson and Harlow were sexting, and never
5 showed him examples of their sexting.

6 Regarding whether Harlow told Joyner about his sexual relationship with Carson
7 or showed him texts demonstrating such a relationship, the Court finds Joyner credible
8 and Harlow not credible. At the Hearing, Harlow testified that he recalls telling Joyner
9 twice that he was having sex with Carson, at a meeting with Joyner and DEA Special
10 Agent Kathryn Wilkinson in a truck shortly after he became an informant and on the day
11 of the controlled purchase before the sale occurred. That first meeting in a vehicle with
12 Joyner and Wilkinson occurred before Harlow introduced Carson to law enforcement.
13 (ECF No. 48-1 at 3; ECF No. 41-6 at 2.) Even accepting Harlow's testimony that Joyner
14 and Wilkinson looked through his text messages during this meeting, there is no evidence
15 that Joyner would have seen messages from Carson in particular nor connected any of
16 those messages if he saw them to the person that Harlow later introduced. It is also
17 unlikely that, on the day of the controlled purchase, Harlow explicitly told Joyner that he
18 was going to have sex with Carson later that night, given Joyner's consistent testimony
19 throughout the Hearing that if he had known about a sexual relationship, he would have
20 used different tactics and not involved Harlow in the controlled purchase.

21 Moreover, nothing in the text messages that Harlow sent to Joyner suggest any
22 sexual relationship between Harlow and Carson. (ECF No. 48-1 at 26-138.) At most,
23 Harlow communicated to Joyner over text that Carson was "infatuated" with him. (*Id.* at
24 6, 81.) At the Hearing, Joyner testified that Harlow's comments that Carson was "naïve"
25 and "infatuated" with him did not cause concern because they were normal comments for
26 an informant with "street smarts," and he did not interpret "infatuation" to necessarily
27 include a sexual component. Joyner also testified that Harlow presented as "confident"
28 and "arrogant" and that it was "not out of the ordinary" for people to do things for him.

1 Having heard Harlow testify, the Court finds that, consistent with Joyner's testimony,
 2 Harlow appears to have a high opinion of himself and to be prone to exaggeration.⁶ From
 3 Joyner's perspective, it makes sense that he would have perceived Harlow's comments
 4 about Carson being "obsessed" with him as exaggerations, particularly given that Joyner
 5 knew Carson was in a long-term relationship with Ono. (ECF No. 48-1 at 4.)

6 The Court therefore finds that Joyner's testimony on this issue is credible, while
 7 Harlow's testimony lacks credibility.

8 **D. Carson's Criminal Record**

9 According to the government, on August 2, 2021, the DEA obtained a record of
 10 Carson's criminal history. (ECF No. 47 at 7; Exh. 510.⁷) In pertinent part, the government
 11 discovered that Carson had been convicted of felony possession of a controlled
 12 substance in California in 2005, arrested multiple times in California between 2007 and
 13 2010 in relation to drug possession and other offenses, and arrested in 2019 for
 14 misdemeanor possession of drug paraphernalia and felony possession of a controlled
 15 substance in Lyon County, Nevada. (*Id.*) During the Hearing, Joyner confirmed that after
 16 he learned about and positively identified Carson, law enforcement ran her criminal
 17 history, and he recalled that her criminal history was "drug related."

18 **E. August 4, 2021 Controlled Purchase**

19 In late July and early August 2021, Harlow, "at the direction of controlling
 20 investigators, arranged for a controlled purchase of a quarter pound of crystal
 21 methamphetamine from [Carson], to be made by [the UC]." (ECF No. 41-1 at 2.) In

22
 23 ⁶In addition to the inconsistencies in Harlow's testimony discussed above, the
 24 Court finds other examples that demonstrate Harlow's tendencies for exaggeration. For
 25 example, he testified that he got Carson involved because he was upset with her—she
 26 did not do as promised. Aside from what the government pointed out in cross-examination
 that Carson did not earn as much as Harlow did for him to expect that Carson would help
 him hire an attorney, Harlow's testimony further shows that Carson did not always do
 what he asked of her.

27 ⁷At the Hearing, the parties stipulated to Exhibit 510, which contains Carson's
 28 criminal history. Because this exhibit was not filed during briefing of the Motion, it does
 not have a corresponding ECF number and is referred to as Exh. 510 in this order. (ECF
 Nos. 71, 72.)

1 particular, Joyner asked Harlow to speak with Carson about introducing her to the UC,
2 which he did, and Carson agreed to meet the UC. (ECF No. 48-1 at 6.) According to
3 Harlow, he asked Carson to get drugs for “a guy [he] worked with” and asked her to do it
4 “as a favor to [him].” (ECF No. 41-6 at 3.) Harlow claims that “[t]he drugs [he] asked her
5 for were way more than anything she had ever had” and that he “knew she would do it
6 since [he] asked.” (*Id.* at 4.) According to Joyner, “Harlow did not tell [him] that Carson
7 agreed to make the sale because she loved him or for any other reason than making
8 money.” (ECF No. 48-1 at 6.)

9 Based on screenshots of text messages between Harlow and Carson that were
10 sent to Joyner, he “did not see any indication that Carson was hesitant to make the
11 introduction.” (*Id.*) On July 29, 2021, Harlow sent Joyner a screenshot of messages, in
12 which he texted Carson, “So a partner of mine out of Reno is looking to get 2 for \$700
13 would you be willing to drive to USA parkway if it can all go through,” to which Carson
14 responded, “Yes, that’s fine.” (*Id.* at 66-67.) On August 2, 2021, Harlow sent Joyner a
15 screenshot of messages, in which Carson and Harlow discussed what appeared to be
16 her source of supply and Carson also stated, “anything I can do for you let me know . . . I
17 care” and “I’ve been thinking of u . . I miss u.” (*Id.* at 69-71.) On August 3, 2021, Harlow
18 had the following conversation over text with Carson, of which he sent portions as
19 screenshots to Joyner. Harlow: Hey so can you meet USA pkwy 830ish tomorrow for qp.”
20 (*Id.* at 146.) Carson: “I will ask.” (*Id.* at 73, 146.) Harlow: “Dude [the UC] has been excited.”
21 (*Id.* at 73, 146.) Carson: Ok.” (*Id.* at 74, 146.) Harlow: “Hopefully they brought it If so trust
22 me you want to save it for this guy as consistent as you guys have been the past few trips
23 this is money making right here alone.” (*Id.* at 73-74, 145.) Carson: “Ok he says yes.” (*Id.*
24 at 73, 145.) Carson: “1250 4 qp / Ok so 8:30 tomorrow.” (*Id.* at 73, 154.) Harlow: “Yes
25 please.” (*Id.* at 154.) The introduction and sale was scheduled for August 4, 2021 at a
26 Burger King parking lot located at 470 USA Parkway, Sparks, Nevada. (*Id.* at 6; ECF No.
27 41-3 at 2.)

1 On August 4, 2021, Joyner and DEA Special Agent Joe DellaVolpe met with
 2 Harlow and transported him to the predetermined location. (*Id.*) Harlow called Carson and
 3 instructed her to meet in the Burger King parking lot. (*Id.* at 2-3.) At approximately 8:30
 4 a.m., Carson arrived in a vehicle with Ono. (*Id.* at 3.) Harlow waved Carson over to the
 5 UC's vehicle, then introduced her to the UC. (*Id.*; ECF No. 48-1 at 158 (recording of sale).)
 6 Carson was carrying a red bag, and the UC asked her, "Is it in there?" (*Id.*) Carson
 7 responded "Yes" and handed the red bag to the UC. (*Id.*) The UC removed the contents
 8 of the red bag—allegedly approximately four ounces of methamphetamine, returned the
 9 red bag to Carson, and paid her \$1,250.00. (*Id.*) The UC said, "If it's good, I wanna get
 10 more," to which Carson responded, "Yeah, yeah." (*Id.*) The UC then asked Carson, "Can
 11 I call you?" Carson gestured to Harlow, who said "fine with me" and remarked about his
 12 schedule. (*Id.*) Carson then said, "Yeah that's fine." (*Id.*) The UC stated, "If I buy more,
 13 can I get a better price?" Carson responded, "Probably yeah." (*Id.*) The UC lastly indicated
 14 that he would call Carson and thanked her. (*Id.*)

15 According to Harlow, Carson "only went through with [the sale] because [he] was
 16 there." (ECF No. 41-6 at 4.) Harlow claims he "was having sex with [Carson] when [he]
 17 set up the sale and when the sale occurred." (*Id.*) Harlow "think[s] she only sold to the
 18 [UC] because [he] asked her to, and she'd do anything for [him]." (*Id.*) Harlow states that
 19 Carson was his "pawn" and that he "feel[s] that [he] took advantage of [his] relationship
 20 with [her] to save [him]self." (*Id.*)

21 **F. Undercover Agent's Post-Sale Communications with Carson**

22 After the controlled purchase, between August 5, 2021 and November 2, 2021, the
 23 UC communicated directly with Carson over text messages. (ECF No. 48-1 at 159-167.)
 24 The UC initially asked Carson for a pound of methamphetamine on August 6, 2021. (*Id.*
 25 at 160.) Meanwhile, Harlow texted Joyner on August 7, 2021, "She's tripping on dude
 26 asking for the whole pound," to which Joyner responded that he would tell the UC to slow
 27 down. (*Id.* at 80.) Joyner then asked "if Carson was cool with everything because [he]
 28 was concerned that [they] had asked for too much too soon." (*Id.* at 6, 80.) Harlow

1 responded that Carson “was cool” and he would “ensure his confidence in [the UC]” but
 2 that they should lower the amount. (*Id.*) Harlow also added, “Remember she is truly
 3 infatuated with me also. I had much persuasion with her.” (*Id.* at 6, 81.) According to
 4 Joyner, he perceived that as a “typical arrogant comment” made by Harlow, and it “did
 5 not change [his] opinion that Carson was selling methamphetamine.” (*Id.* at 6.)

6 Carson eventually agreed to the UC’s ask but subsequently explained that she
 7 was unable to get the drugs unless the UC was willing to go with her to Richmond to get
 8 them. (*Id.* at 160-161.) The UC communicated that he was unable to make the trip and
 9 continued to ask for the pound of methamphetamine. (*Id.* at 161-162.) The UC indicated
 10 that if Carson could not bring him back a pound, he would “take whatever [she] ha[s].” (*Id.*
 11 at 162.) At that point, Carson told the UC to go through Harlow going forward. (*Id.* at 163.)
 12 The UC continued to insist that he would “take whatever [Carson] ha[d] on hand,” to which
 13 she responded that she was “going through [her] dead mom’s stuff” and would not be
 14 back until a later date. (*Id.*)

15 Almost a week later, the UC contacted Carson again. (*Id.*) Carson responded that
 16 she could sell him “[m]aybe half of what [he] wants.” (*Id.*) Shortly thereafter, Carson
 17 communicated that “[a]fter thinking about it [she was] not selling anything anymore”
 18 because “too many people [had her] name in their mouth.” (*Id.* at 164.) The UC asked
 19 Carson to connect him with “[her] guy in [R]ichmond,” to which Carson agreed, but those
 20 plans did not pan out. (*Id.* at 164-165.) The UC reached out a few more times to Carson
 21 who responded again that they would need to go to Richmond to get the drugs. (*Id.* at
 22 166.) She later indicated that she had a half-pound of methamphetamine and asked the
 23 UC how much he wanted to pay for it. (*Id.*) Carson and the UC appeared to agree on a
 24 price, but then Carson stopped responding to the UC’s messages, so the sale never
 25 occurred. (*Id.* at 167.)

26 **G. Carson’s Post-Arrest Interview**

27 On January 12, 2022—about five months after the controlled purchase—
 28 Wilkinson, Joyner, and LCSO Detective Wayne Hawley interviewed Carson while she

1 was in custody at the Yerington Jail Facility after being arrested for charges unrelated to
 2 those at issue here. (ECF No. 48-1 at 168-187 (post-arrest interview report and audio
 3 recording).) Carson stated that on three occasions over the past year, a drug supplier
 4 from Richmond, California would bring methamphetamine to Nevada, and Carson would
 5 “get rid of it” for him. (*Id.* at 170.) Carson informed Wilkinson that the largest amount she
 6 had “gotten rid of” for that drug supplier was a half-pound of methamphetamine for \$2,200
 7 and that, on the other two occasions, she “got rid of” quarter pounds of methamphetamine
 8 for \$1,200 each. (*Id.* at 170-171.) After “getting rid of” the drugs, she would give the money
 9 to the drug supplier. (*Id.* at 182.) Carson later clarified that she had buried the half pound
 10 in the desert and ultimately lost it. (*Id.* at 180-181.) During the interview, when Wilkinson
 11 asked Carson if Harlow had ever offered to sell her anything, she responded that she
 12 “does not deal with him like that.” (*Id.* at 175.) Carson also mentioned that Harlow and
 13 Ono “don’t talk” because she had “slept with Harlow once.” (*Id.* at 177.) At the Hearing,
 14 Joyner testified that that was his first time hearing that Carson and Harlow had had sex.

15 III. DISCUSSION

16 When law enforcement officers’ actions are “so outrageous that due process
 17 principles would absolutely bar the government from invoking judicial processes to obtain
 18 a conviction,” courts must dismiss the indictment. *U.S. v. Russell*, 411 U.S. 423, 431-32
 19 (1973). This remedy is “limited to extreme cases in which the government’s conduct
 20 violates fundamental fairness.” *U.S. v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011).

21 “It is outrageous for government agents to (1) engineer and direct a criminal
 22 enterprise from start to finish; (2) to use excessive physical or mental coercion to convince
 23 an individual to commit a crime; or (3) to generate new crimes merely for the sake of
 24 pressing criminal charges.” *U.S. v. Pincombe*, Case No. 2:14-cr-00178-JAD-GWF, 2015
 25 WL 8480079, at *5 (D. Nev. Nov. 3, 2015) (citing *U.S. v. Black*, 733 F.3d 294, 302 (9th
 26 Cir. 2013)); *see also U.S. v. Stenberg*, 803 F.2d 422, 429 (9th Cir. 1986) (“Constitutionally
 27 unacceptable conduct includes, but is not limited to, situations where law enforcement
 28 agents employed unwarranted physical or mental coercion, where ‘government agents

1 engineer and direct the criminal enterprise from start to finish,’ and where the government
 2 essentially manufactures new crimes in order to obtain the defendant’s conviction.”)
 3 (internal citations omitted). Because “[t]here is no bright line dictating when law
 4 enforcement conduct crosses the line between acceptable and outrageous,” each case
 5 turns “on its own particular facts.” *Black*, 733 F.3d at 302 (citations omitted).

6 To help guide this circumstance-specific inquiry, the Court considers the six factors
 7 set forth in *U.S. v. Black*:

- 8 (1) known criminal characteristics of the defendant;
- 9 (2) individualized suspicion of the defendant;
- 10 (3) the government’s role in creating the crime of conviction;
- 11 (4) the government’s encouragement of the defendant to commit the
 offense conduct;
- 12 (5) the nature of the government’s participation in the offense conduct; and
- 13 (6) the nature of the crime being pursued and necessity for the actions taken
 in light of the nature of the criminal enterprise at issue.

14 733 F.3d at 303. The first three factors address the government’s conduct when initiating
 15 a sting, with factors four and five addressing the conduct of the government during the
 16 operation. See *id.* at 303-04, 308. The final factor concerns the relationship between the
 17 type of crime being investigated and whether the techniques used by the government
 18 were necessary. See *id.* at 309. The facts of the case and surrounding circumstances
 19 must be considered in their totality. See *id.* at 304 (noting that the factors “do not constitute
 a formalistic checklist” but rather help courts focus their analysis).

20 The Court finds that the *Black* factors weigh against dismissal and explains its
 21 reasoning below, first addressing what law enforcement knew about Carson before
 22 initiating the operation, then considering the government’s role in creating the crime,
 23 whether the government encouraged or pressured Carson to commit the offense, and the
 24 nature of the government’s participation in the offense conduct. Finally, the Court weighs
 25 the need for such tactics in prosecuting drug distribution and trafficking crimes.

26 **A. Known Criminal Characteristics & Individualized Suspicion**

27 Courts often consider the first two *Black* factors together, as they are “closely
 28 related.” *U.S. v. Snagglers*, Case No. 2:14-cr-00086-JCM-PAL, 2015 WL 10436117, at

*6 (D. Nev. Dec. 30, 2015). The first factor asks “whether a defendant had a criminal background or propensity the government knew about when it initiated its sting operation.” *Black*, 733 F.3d at 304. The second factor considers whether the government had reason to connect the suspected individual (or group to which the individual belonged) with the targeted offense under investigation. See *id.* Strictly speaking, law enforcement need not have individualized suspicion of a defendant’s wrongdoing before conducting an undercover investigation. See *U.S. v. Luttrell*, 923 F.2d 764, 764 (9th Cir. 1991) (en banc). However, whether law enforcement “had reason to suspect an individual or an identifiable group before initiating a sting operation is an important consideration.” *Black*, 733 F.3d at 304.

Carson argues the government lacked individualized suspicion of her because she was unknown to law enforcement before Harlow identified her, and even the government’s own investigation of Carson before the controlled purchase indicated that she was a drug user not a drug dealer. (ECF No. 41 at 14-15; ECF No. 58 at 21-22.) The government argues that there was “[a]mple evidence show[ing] that [Carson] was already engaged in drug sales before the government’s investigation,” including Harlow’s screenshots of Carson allegedly advertising the sale of methamphetamine, Carson’s history of drug arrests and convictions, and Carson’s statements in her post-arrest interview that she acted as an intermediary between dealers and buyers. (ECF No. 47 at 25-26.)

As an initial matter, because Carson’s post-arrest interview occurred on January 12, 2022 (ECF No. 48-1 at 169), the government may not attribute Carson’s statements made in that interview as part of its knowledge before the August 4, 2021 controlled purchase. See *U.S. v. Pedrin*, 797 F.3d 792, 797 (9th Cir. 2015) (“What the government learns only after the fact cannot supply the individualized suspicion that is necessary to justify the sting if the government had little or no basis for such individualized suspicion when it was setting up the sting”). The Court therefore does not consider the post-arrest interview as part of its analysis of the first two *Black* factors.

1 For these factors, “the question is not whether a defendant *in fact* ‘may have been
2 predisposed to commit [the crime]’ . . . [but] [r]ather, it is whether the government had
3 reason to believe, in light of what it knew as it was setting up the sting, that a defendant
4 was so predisposed.” *Pedrin*, 797 F.3d at 797 (internal citations omitted). Here, as the
5 government was setting up the controlled purchase, the government possessed
6 knowledge of Carson’s criminal history, as well as the information and screenshots
7 Harlow shared with Joyner about Carson. At the time, Carson had a few non-drug-related
8 misdemeanor convictions, several arrests related to drug possession and other offenses,
9 and a felony conviction for drug possession. (ECF No. 47 at 7; Exh. 510.) Carson’s
10 criminal record appears consistent with someone with a drug addiction and, on its own,
11 may be insufficient to demonstrate a propensity for drug distribution.

12 However, combined with Harlow’s information provided to Joyner that Carson was
13 selling methamphetamine, the Court finds the government had reason to believe Carson
14 was predisposed to selling methamphetamine. In July 2021, Harlow sent screenshots of
15 text messages to Joyner and later provided context for the screenshots over the phone
16 that indicated Carson was selling three to four ounces of methamphetamine. (ECF No.
17 48-1 at 4, 51-55; ECF No. 41-2 at 2.) Although Harlow claims he told Joyner that Carson
18 was not a drug dealer, the Court finds that testimony not credible, as already discussed.
19 Even if Harlow did not believe Carson was a “bona fide drug dealer,” as he stated during
20 the Hearing, it appears he at least led Joyner to believe that Carson was selling drugs.
21 And Joyner in fact testified that he believed Carson was selling methamphetamine based
22 on Harlow’s information.

23 Moreover, based on Harlow’s track record at the time, Joyner had reason to
24 believe that Harlow’s information on Carson’s alleged drug selling was reliable. Before
25 informing on Carson, Harlow provided information to Joyner about a fraud ring, stolen
26 motorcycle, and another drug trafficking scheme that proved to be reliable. (ECF No. 48-
27 1 at 3-4). And while informing on Carson, Harlow provided accurate information about a
28 traffic stop Carson had been involved in with one of her purported drug suppliers. (*Id.* at

1 5.) Accordingly, Harlow's tip, together with Carson's drug-related criminal history, created
2 an individualized suspicion of wrongdoing to justify the undercover operation. See *Pedrin*,
3 797 F.3d at 797. While a close call, the Court finds the first two *Black* factors weigh against
4 dismissal.

B. Government's Role in Creating the Crime, Encouraging the Defendant, and Participating in the Offense Conduct

The Court next considers the third, fourth, and fifth *Black* factors together because they overlap. Carson argues that the government used Harlow who exerted “total control” over Carson to manufacture the crime from start to finish. (ECF No. 41 at 16-17.) The government counters that it merely “stepped into [Carson]’s ongoing drug sales business” and that the nature of the relationship between Carson and Harlow was not coercive. (ECF No. 47 at 26-27.)

For this analysis, the Court considers “whether the government approached the defendant initially or the defendant approached a government agent, and whether the government proposed the criminal enterprise or merely attached itself to one that was already established and ongoing.” See *Black*, 733 F.3d at 305 (citation omitted). Here, it is undisputed that Harlow, at Joyner’s direction, approached Carson first to set up the sale between her and the UC. (ECF No. 41-1 at 2; ECF No. 48-1 at 6; ECF No. 41-6 at 2.) However, there is evidence that suggests Carson was already involved in drug distribution. In Carson’s post-arrest interview, she admitted to “getting rid” of—that is, selling—methamphetamine for a drug supplier on a few occasions. (ECF No. 48-1 at 170-171.) This is corroborated by: (1) screenshots of text messages shared with Joyner before and after the controlled buy (*id.* at 70, 76, 85), in which Carson made references to individuals whom she later identified as drug dealers in her post-arrest interview (*id.* at 170-172); and (2) law enforcement’s analysis of Carson’s phone, which contained text messages from July 26, 2021 appearing to indicate that Carson had been working with one of those drug suppliers shortly before the controlled purchase (*id.* at 192-194).

1 The evidence also shows limited government participation because Carson had
2 the technical expertise and resources to commit the offense without government
3 intervention. See *Black*, 733 F.3d at 309 (“[C]ourts have examined the *necessity* of the
4 government’s participation in the criminal enterprise—whether the defendants would
5 have had the technical expertise or resources necessary to commit such a crime without
6 the government’s intervention.”). Harlow testified at the Hearing that he knew Carson “had
7 resources” to get drugs if he asked her to. And according to Carson’s own text messages
8 with Harlow and the UC, she appeared to have her own contacts to supply her with drugs
9 and knowledge of the pricing, timing, and progress of various drug shipments. (ECF No.
10 48-1 at 73-74, 160-167.)

11 Carson argues that it does not matter whether she had sold drugs before the
12 August 4, 2021 controlled buy because she would not have gone through with the sale if
13 not for Harlow’s request and involvement. (ECF No. 58 at 22.) This goes towards whether
14 Harlow’s relationship with Carson was coercive, which the Court finds to be a close call.
15 Harlow claims that he could get Carson to “do anything” for him. (ECF No. 41-6 at 3.)
16 While there are text messages between Carson and Harlow from June 2021 in which
17 Carson communicates several times that she loves him and offers to buy groceries for
18 him and send him money (ECF No. 42 (video of Carson-Harlow messages)), those
19 messages are unprompted by Harlow and do not necessarily indicate coercion. There is
20 also at least one text message from August 2021 in which Carson appears to decline to
21 do what Harlow asks of her (ECF No. 48-1 at 142 (“I can’t now I’m sorry”)). And as noted
22 earlier, the Court finds Harlow to be prone to exaggeration, and his text messages with
23 Carson regarding the drug sale do not support his claim that he asked her to get drugs
24 “as a favor to [him]” (ECF No. 41-6 at 3). In those text exchanges, he did not ask her to
25 sell drugs *for him* or as a favor to him, and the exchanges appear largely business-like
26 and transactional. (ECF No. 48-1 at 67, 73-74.)

27 Moreover, Carson did not appear reluctant when agreeing to the sale in those text
28 exchanges nor was she hesitant at the sale itself, suggesting a lack of coercion. (*Id.*; ECF

1 No. 48-1 at 158 (recording of sale).) See also *Black*, 733 F.3d at 308 (finding little
2 evidence of coercion because “the defendants eagerly jumped at the opportunity” when
3 the government “proposed the stash house robbery”). Carson argues that the fact that
4 she did not continue to sell to the UC after the controlled buy demonstrates that she would
5 not have sold drugs without Harlow’s involvement. (ECF No. 41 at 17.) But according to
6 Carson’s text messages with the UC, she does agree to sell additional drugs to the UC
7 at several points, although she ultimately backs out for various reasons, including
8 because “too many people [had her] name in their mouth.” (ECF No. 48-1 at 160-167.)
9 And according to Harlow’s exchanges with Joyner, Carson was “tripping on dude [the UC]
10 asking for the whole pound.” (*Id.* at 80.) The evidence therefore suggests that Carson
11 became reluctant to continue selling to the UC at least in part because of the increased
12 amount the UC was asking for and fear of apprehension, not necessarily because Harlow
13 was no longer involved.

Even assuming Harlow's relationship with Carson was indeed coercive, the evidence suggests that the government did not have sufficient knowledge about that relationship to improperly take advantage of it. As discussed above, the Court finds credible Joyner's testimony that, before the controlled purchase, he did not know about any intimate relationship between Harlow and Carson that would have raised concerns or prompted him to investigate further.⁸ Moreover, from Joyner's perspective, Carson appeared to be in a long-term relationship with Ono, who even accompanied her to the controlled sale. Ono's presence at the sale would have appeared inconsistent with the existence of a relationship between Carson and Harlow that Carson would have likely been trying to hide from Ono. Accordingly, even if Harlow exploited an emotionally intimate and sexual relationship with Carson, Harlow's conduct cannot be attributed to the government's conduct. See *United States v. Simpson*, 813 F.2d 1462, 1467 (9th Cir.

27 ⁸At the Hearing, Carson argued that Joyner knew enough about Carson and
28 Harlow's relationship to trigger a duty to inquire or investigate before using Harlow to set
up the controlled buy. However, there is no independent duty to verify or investigate
contemplated within the *Black* factors analysis.

1 1987) (noting that the court previously “held there was no due process violation when,
 2 unbeknownst to the government, a paid informant had sex with [their target]” because
 3 “the informant’s use of sex . . . was not attributable to the government.”).

4 The Court therefore finds that the third, fourth, and fifth *Black* factors weigh against
 5 dismissal.

6 **C. Nature of the Crime Being Pursued and Necessity for Law
 Enforcement’s Actions**

8 As the final factor in the *Black* analysis, the Court considers “the need for the
 9 investigative technique that was used in light of the challenges of investigating and
 10 prosecuting the type of crime being investigated.” 733 F.3d at 309. The Court finds that
 11 drug trafficking and distribution are uniquely hard to police and that apprehending
 12 suspects is difficult without the use of undercover agents and confidential informants, like
 13 Harlow, who have inside knowledge and pre-existing connections to drug dealers.
 14 Controlled drug purchases, like the one in this case, are often required to effectively
 15 uncover individuals who are selling drugs like methamphetamine. The sixth factor
 16 therefore weighs against dismissal.

17 **D. Continued Use of Informant Who Has Sex with Target**

18 Carson additionally argues that dismissal is further warranted because pre-*Black*
 19 courts have dismissed indictments based on outrageous government conduct where a
 20 sexual relationship between a defendant and a government agent has been shown to
 21 exist. (ECF No. 41 at 18-19.) To establish outrageous government conduct in such cases,
 22 “at a minimum, the defendant must show: (1) that the government consciously set out to
 23 use sex as a weapon in its investigatory arsenal, or acquiesced in such conduct for its
 24 own purposes upon learning that such a relationship existed; (2) that the government
 25 agent initiated a sexual relationship, or allowed it to continue to exist, to achieve
 26 governmental ends; and (3) that the sexual relationship took place during or close to the
 27 period covered by the indictment and was entwined with the events charged therein.”

28

1 *United States v. Cuervelo*, 949 F.2d 559, 567 (2d Cir. 1991); see also *Simpson*, 813 F.2d
 2 at 1467-68.

3 Here, Carson argues dismissal is warranted because: (1) the government knew of
 4 Harlow and Carson’s sexual relationship because Harlow discussed it with Joyner; (2)
 5 Harlow and Carson’s sexual relationship began before the offense, and he exploited that
 6 relationship to further the investigation; and (3) the sexual relationship took place during
 7 the investigation and the controlled purchase. (ECF No. 41 at 19-20.) The government
 8 argues that, under *Black* and *Simpson*, its use of Harlow as a confidential informant was
 9 appropriate because the government did not direct Harlow to induce Carson to commit
 10 the crime through sexual favors. (ECF No. 47 at 28-30.) The Court agrees with the
 11 government.

12 First, as already discussed, the Court finds that the government did not know about
 13 Harlow and Carson’s sexual relationship before or during the controlled purchase and
 14 therefore could not have “acquiesced in such conduct for its own purposes,” let alone
 15 “consciously set out to use sex as a weapon in its investigatory arsenal.” See *Cuervelo*,
 16 949 F.2d at 567. Second, Harlow testified at the Hearing that he and Carson both initiated
 17 the sexual relationship. But accepting Harlow’s claims about their relationship as true and
 18 assuming he was taking on the role of a government agent, he took advantage of the
 19 relationship for his own ends to benefit himself and not for legitimate government ends.
 20 As in *Simpson*, where the court found no outrageous government conduct, Harlow’s
 21 “official role was limited to that of introducing a willing seller of narcotics to a willing
 22 purchaser,” and the government here “did nothing to encourage [him] to use sex in
 23 carrying out [his] assignment.” See 813 F.2d at 1467. Accordingly, even assuming a
 24 sexual relationship existed between Carson and Harlow during the investigation and
 25 controlled purchase, the Court finds that Harlow’s “decision to establish a [purportedly]
 26 deceptive sexual and emotional relationship cannot be used to characterize the
 27 government’s conduct in this case as outrageous.” See *id.*

28

At the same time, the Court acknowledges Carson's argument at the Hearing that none of the relevant cases that involve a government informant who has sex with a target, including *Simpson*, predate the #MeToo movement and therefore do not fully account for the power imbalance that can exist in relationships between men and women, such as Harlow and Carson. The Court recognizes that these types of unequal and exploitative power dynamics unfortunately exist. But even accepting Carson's arguments on their face that she was an addict, in love with Harlow who was her dealer, and manipulated by him, Harlow's deceptive conduct in which he "played both sides" cannot be imputed to the government.

In sum, the Court finds that the government's conduct in this case did not exceed the bounds of what the Ninth Circuit has found acceptable in prior cases, and Carson has failed to meet the "extremely high standard" for dismissal on the grounds of outrageous government conduct. See *Black*, 733 F.3d at 302.

IV. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the motion before the Court.

It is therefore ordered that Carson's motion to dismiss for outrageous government conduct (ECF No. 41) is denied.

DATED THIS 4th Day of August 2023.

MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE